Office-Supreme Court, U.S.
FILED
DEC 13 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 819

HARRY A. REOUX, *Petitioner*

v.

THE FIRST NATIONAL BANK OF GLENS FALLS, (as Executor of the Estate of Adelia H. Reoux, deceased), *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PEYTON FORD
Attorney for Petitioner

Of Counsel:

FORD, AYER AND HORAN
1000 Connecticut Avenue, N.W.
Washington, D. C.

JAMES C. STRANEY
3 Gaffers Court
Latham, New York

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question Presented	3
Statement of the Case	3
Reasons for Granting the Writ	12
Appendix	1a

CITATIONS

Estes v. Texas, 381 U.S. 532	22
Harkin v. Brundage, 13 F.2d 617 (7th Cir. 1926)	19
In re Schildhaus, 23 A.D.2d 152, 259 N.Y.S.2d 631	19
Nilva v. U. S., 227 F.2d 74 (8th Cir. 1955)	19
Matter of Rotwein, 20 A.D.2d 428, 247 N.Y.S.2d 775	19
Matter of V., 10 A.D. 461, 42 N.Y.S. 268	19
Mooney v. Holohan, 294 U.S. 103	21
Moore v. Dempsey, 261 U.S. 86	21
Tumey v. Ohio, 273 U.S. 510	21

STATUTES

New York Decedent's Estate Law § 34	14
New York Judiciary Law, Appendix-Canons of Professional Ethics	17
New York Penal Law § 273	17
28 U.S.C. § 1257(3)	2

MISCELLANEOUS

Columbia Law Review (Vol. 52, 1952)	18
Drinker, Legal Ethics (1st ed. 1953)	19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

HARRY A. REOUX, *Petitioner*

v.

THE FIRST NATIONAL BANK OF GLENS FALLS, (as Executor of the Estate of Adelia H. Reoux, deceased), *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above-entitled case on June 10, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York is reported at 16 N.Y.2d 685, 261 N.Y.S.2d 887, and is reproduced herein as Appendix A; the opinion of the Appellate Division, Third Department is reported at 21 A.D.2d 940, 251 N.Y.S.2d 286 (Appen-

dix B); the opinion of the Supreme Court, Warren County, Special Term, is reported at 40 Misc.2d 442, 243 N.Y.S.2d 466 (Appendix C); the opinion of the Appellate Division, Third Department, granting a new trial is reported at 16 A.D.2d 543, 229 N.Y.S.2d 934 (Appendix D). Prior decisions involving the same litigants and controversy include: 3 N.Y.2d 940, 168 N.Y.S.2d 11 (Appendix E); 3 A.D.2d 560, 163 N.Y.S. 2d 212 (Appendix F); opinion of Official Referee, Supreme Court, Warren County (unreported) (Appendix G).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

The decision of the Court of Appeals of New York was entered on June 10, 1965; a motion for reargument was denied and judgment entered on July 16, 1965; Mr. Justice Harlan entered an order granting petitioner's motion for extension of time within which to file a Petition for Certiorari to and including December 13, 1965. The Federal Question relates to the denial of petitioner's right to due process of law and a fair trial assured to him by the Fourteenth Amendment to the United States Constitution. This issue first became a question in this case at the time that petitioner moved for a new trial, *Reoux* v. *The First Nat'l Bk. of Glens Falls,* (Appendix D), alleging that his deceased mother (the original defendant, since substituted for by the present respondent) and her attorney had concealed and suppressed evidence which was crucial to the determination of the central issue in the original action, and that this suppression denied petitioner due process of law and a fair trial.

The Appellate Division granted the new trial "in the interest of justice". (Appendix D, at 17a). Subsequently the Supreme Court of Warren County, Special Term, held a new trial and found for petitioner, basing its decision upon the newly discovered evidence. (Appendix C). The Appellate Division, *per curiam,* affirmed Special Term. (Appendix D). The Court of Appeals of the State of New York reversed the Appellate Division, *per curiam,* finding that the newly discovered evidence did not refute petitioner's admissions of undue influence and overreaching. (Appendix A). In motion for reargument the Federal Question was again presented. The Court denied reargument without an opinion.

QUESTION PRESENTED

Was petitioner denied due process of law and a fair trial by the action of the Court of Appeals of the State of New York in reinstating a decision which had been procured by the suppression of evidence at trial by respondent's counsel, an officer of the courts of the State of New York, where the effect of this suppression was to prevent evidence from coming before the Court at the one point in time when it would have conclusively proved petitioner's case?

STATEMENT OF THE CASE

This much-litigated intra-family controversy finds its genesis in a 1924 oral agreement made between petitioner and his mother and father. In essence the agreement was that the mother and father would assure that petitioner would share their estate evenly with his sister, if petitioner would, after completing his legal studies, come back to the family home in Warrensburg and work with his father in the administration of the

various family businesses and be responsible for looking after his mother's extensive real estate holdings. (Appendix F, at 21a).

These facts are well-documented and it cannot be denied that petitioner fulfilled his part of this understanding. Although the agreement was probably not enforceable at law because of the Statute of Frauds, the parties acted according to it for nearly thirty years. Petitioner spent literally thousands of unrecompensed hours supervising the lumbering of his mother's lands, searching and clearing her title to many more acres of land, and generally increasing the value and income to her from the lands. He also frequently acted as her attorney in legal matters affecting the lands, although he was seldom recompensed for this representation and, in fact, at times had to pay expenses and costs himself. Petitioner also assisted his father in several business enterprises. (Appendix F, at 21a).

In 1938 petitioner's father died. Petitioner's mother was named Executrix and sole beneficiary under the father's Will. Petitioner served his mother as attorney in the administration of the estate. Thereafter he continued to look after his mother's financial and legal affairs. His activities on his mother's behalf consumed considerable time, especially since Mrs. Reoux spent a part of each year in Florida and the remainder at petitioner's sister's home, which required him to carry on extensive correspondence and long-distance telephoning to keep her apprised of his activities. (R. 29-34).[1]

---

[1] Record citations herein are to the Record on Appeal, filed in the Court of Appeals of the State of New York, ten copies of which were filed in this Court.

Petitioner worked diligently to procure for his mother profitable investments and he was eminently successful in his work. His stewardship increased the value of her securities many times over. (R. 31-32). Indicative of the extent of Mrs. Reoux's confidence in her son's judgment in these financial matters, and her reliance upon his assistance, is the testimony of the broker who handled her account. He testified that Mrs. Reoux instructed him to consult petitioner on every sale or purchase, and further, that the account had been a "very profitable" one. (R. 109).

During the period from 1938 to 1953, petitioner's mother had made gifts to both petitioner and his sister, Mary Beswick, who was married to an attorney, Albert Beswick. (R. 63-68). As the Appellate Division noted in one of its numerous decisions in this case, "the record shows that subsequent to the death of the husband and father of the parties, a well-defined testamentary plan was established by the mother to treat her son and daughter on equal terms". *Reoux* v. *The First Nat'l Bk. of Glens Falls.* (Appendix D, at 11a).

However, this "well-defined testamentary plan" began to become somewhat ill-defined beginning in 1950 and continuing through 1953. During this period petitioner's mother (who was then 77-80 years of age and in failing health) removed a large amount of her securities from the safety deposit box controlled by petitioner and herself, along with a Will she had made some years previous, the terms of which divided her estate equally between petitioner and his sister. (R. 32-33; 165). Petitioner's mother removed these securities to a bank in the city where her daughter and son-in-law resided. Late in this period of time she also transferred large amounts of securities to her daughter,

Mary Beswick, as well as to Mrs. Beswick's children. Mrs. Reoux also made a new Will during this time, the terms of which excluded petitioner entirely. (R. 96-102).

During July of 1953 petitioner's mother suffered a slight setback in her health, which necessitated her hospitalization. Thereafter she began convalescence at a rest home. (R. 35). While she was convalescing she requested that petitioner draft another Will for her, to follow the pattern of the original Will, *i.e.*, to provide for the equal division of her estate between petitioner and his sister. Petitioner drew such a Will and, on July 21, 1953, his mother executed it. (R. 168).

In the months of August and September of 1953, Mrs. Reoux continued her convalescence at petitioner's home. At this time petitioner, alarmed at the fact that his mother failed to receive dividend checks on a large number of her stocks, learned for the first time that his mother had made the aforementioned transfer of securities to Mary Beswick and her children. After petitioner discussed this with Mrs. Reoux, and the effect the transfer had upon the "share-equally" agreement, Mrs. Reoux decided to convey some of her remaining securities to petitioner in order to effect the balance in her giving which she had previously maintained. Thereafter, on September 19, 1953, Mrs. Reoux signed over some of her securities to her son. (R. 36-51). These transfers were made complete and final several days later when the securities were transferrd to petitioner's name.

Shortly thereafter Mrs. Reoux ended her rest at petitioner's home and again took up residence at the home of Mary and Albert Beswick. It was not long

after this (November 5, 1953) that Albert Beswick, himself an attorney who had performed legal duties for Mrs. Reoux in the past, arranged a meeting between Mrs. Reoux and a Trust Officer of the First National Bank of Glens Falls (respondent of record in this proceeding) for the purpose of discussing the terms of Mrs. Reoux's Will. Mr. Beswick brought Mrs. Reoux to the bank for a conference the same day that he called for an appointment. (R. 84). As a result of a conference between Mrs. Reoux, the trust officer and an attorney for the bank, Mrs. Reoux, accompanied by her daughter, returned on November 9th and executed a new Will which left all of her estate to her daughter or to her daughter's heirs. (R. 146). Petitioner was completely disinherited by this Will. Mrs. Reoux desired to explain her reasons for disinheriting petitioner, and it was suggested that she should write a letter of even date, explaining her reasons for not mentioning her son. This letter stated:

> Gentlemen: By my will of this date, I have made no provision for my son, Harry Reoux. My reason for this action is that I have made transfers of securities to him in my lifetime which, with his other assets, should adequately provide for him and his family. I have reached this conclusion without suggestion from anyone and as a result of considerable thought on my part.
>
> Very truly yours, Adelia H. Reoux. (R. 74-75).

Mary Beswick was present at the writing of this letter and knew its contents. (R. 78-79).

Shortly after the above-described Will signing, Mrs. Reoux transferred extensive real property holdings to Mary Beswick, the deeds to which were written by

Albert Beswick. (R. 103-05). These properties would have ultimately passed to the Beswick children under the terms of the November 9, 1953 Will. Early in 1954 petitioner visited his mother in Florida, where she had gone, following her usual custom. By this time he had become aware that a transfer of an extensive part of his mother's real estate had been made to his sister, and that his brother-in-law had drawn the deeds to accomplish the transfer.

Petitioner questioned his mother concerning the fact of the transfer of her land, and questioned her as to what effect this was to have on the "share-equally" agreement. (Petitioner did not have any knowledge at this time of the November 9 Will which entirely disinherited him.) In order to maintain the "balance of giving" pattern which she had established and followed since 1938, Mrs. Reoux decided to transfer to petitioner certain stocks and bonds, which she did by way of bill of sale on April 1, 1954. Unlike the securities transferred on September 19, 1953, these securities did not have the endorsements necessary for their complete transfer to petitioner. On July 23, 1954 petitioner delivered to his mother at her daughter's home the necessary stock and bond powers required to complete the transfer and requested that she sign the necessary instruments.

On August 2, 1954 Mrs. Reoux, then living with her daughter, responded with a registered letter:

> Dear Harry:
>
> I have received your registered letter demanding that I turn over all of my stocks to you.
>
> You told me last winter that the paper you had me sign was for the Imperial and other stocks that I

gave you last fall. I never intended giving you any more than you already had and I am not going to give you any more.

Mother.

On August 4, 1954 petitioner filed a complaint to compel his mother to deliver to him endorsements of the April 1, 1954 stocks and bonds which he had in his possession. (R. 4). Mrs. Reoux filed an answer denying any legal obligation to do such and a counterclaim, demanding the return of the securities which had been transferred to petitioner on September 19, 1953 (R. 11), and which had previously been fully and finally transferred to petitioner's name.

While a person does not sue his mother in the ordinary course of events, and such a suit hardly evokes sympathy on behalf of the complainant, this suit must be seen in the light of the real circumstances existing at the time in order to place it in proper perspective. Petitioner was not suing his mother, although she was the named defendant. He was in fact attempting to bring out in the open the activities of his sister and her husband which were bringing about the dissipation of his mother's estate, and to prevent them from further manipulating Mrs. Reoux to serve their own economic ends.

In August, 1954 Mrs. Reoux was referred by her son-in-law, Albert Beswick, to Ernest B. Morris as an attorney to represent her in the action which had been brought by petitioner. (R. 83-89). After retaining him as her attorney (he has remained such throughout), Mrs. Reoux both informed him of the existence of the November 9, 1953 Will and provided him with a copy of same, *prior to* the trial on the merits. (R. 87). Mr. Morris testified that he had extended conversa-

tions with Mrs. Reoux about this Will *prior to* trial. (R. 89). It is inconceivable that Mr. Morris did not also have knowledge of the accompanying letter. However, in spite of the fact that Mrs. Reoux, her attorney, and her son and daughter-in-law knew of the existence of the November 9, 1953 Will, and in spite of the fact that these persons knew of the existence of the November 9 letter, neither of these documents were put into evidence at trial. Instead, Mrs. Reoux's counsel placed in evidence the July 21, 1953 Will, which maintained the "share-equally" plan and dwelt at great length upon the circumstances surrounding its making and what it augured for the proceeding. (Appendix F, at 22a). Mrs. Reoux's counsel was thus tacitly, if not explicitly, representing to the court that the July 21, 1953 Will was her legal, subsisting Will, when in fact he had explicit knowledge of the fact that this Will had been revoked and that there existed a subsequent Will, the terms of which bore directly on the issues before the referee.

Mrs. Reoux, who by this time was eighty-two years old, and who was then living with her daughter and son-in-law, testified in a confused and contradictory manner and did not mention the Will or the letter.

After an extensive trial, the Official Referee of the Supreme Court, Warren County, found for petitioner. The Supreme Court thereafter entered judgment on the decision of the referee, directing Mrs. Reoux to endorse or assign the stocks and bond certificates, and dismissed the counterclaim. In his opinion, the referee remarked:

> I am convinced that the daughter has enriched herself out of her mother's property to the detriment

of her brother. But for her acts, conduct and greed this lawsuit never would have arisen. (Appendix G, at 28a).

On appeal, the Supreme Court, Appellate Division reversed, holding that the evidence established that Mrs. Reoux had no legal obligation to give her son anything during her lifetime and that the petitioner was not entitled to any of the securities. Petitioner's cause of action was dismissed and judgment was directed for the mother on her counterclaim. (Appendix F). *In so holding the Appellate Court placed great stress upon the existence and terms of the July 21, 1953 Will, finding that, on the basis of the equal distribution announced therein, Mrs. Reoux had complied with the 1924 oral agreement, stating that she* "complied with the very agreement which plaintiff claims". (Appendix F, at 22a). Judgment was entered on December 3, 1957 against petitioner in the amount of $99,306.54.

The Court of Appeals, State of New York unanimously affirmed (without opinion) the Appellate Division. (Appendix E). Mrs. Reoux's counsel continued to suppress the fact of the existence of the subsequent Will and letter before these appellate courts.

Mrs. Reoux died on August 18, 1958. The Will dated November 9, 1953 was offered for probate proceedings and was admitted to probate following a trial of objections interposed by petitioner. Accompanying this Will was the November 9 letter explaining petitioner's disinheritance.

On the basis of this "newly discovered evidence", the Appellate Division took the extraordinary action of reversing its original decision and granted petitioner's motion for a new trial on the counterclaim, finding it-

self compelled to do so "in the interests of justice". (Appendix D). In granting the new trial the court well noted the fact that respondent [and thereby her counsel] *had known of the existence of the Will and of the letter of explanation.* The court also noted its own reliance on the July 21, 1953 Will in making its original decision. (Appendix D, at 13a).

On retrial, it was found that the evidence established that the securities which Mrs. Reoux had delivered to her son on September 19, 1953 (the subject of the counterclaim) had been freely and voluntarily given. (Appendix C). This decision was affirmed, *per curiam,* by Appellate Division. (Appendix B). On appeal to the Court of Appeals of the State of New York, the judgment was reversed and the prior judgment of December 3, 1957 was reinstated. (Appendix A). In reversing, *per curiam,* the court held that the newly discovered evidence did not refute plaintiff's alleged undue influence and overreaching nor did it reveal any donative intent on the part of the mother as to the securities in question. Thus petitioner failed to carry the burden, cast upon him because of the "attorney-son" confidential relationship, of establishing by clear and satisfactory evidence that the transfer of securities in question was a "valid and voluntary gift".

REASONS FOR GRANTING THE WRIT

This case is perhaps the most litigated of its type in the history of New York jurisprudence. It is now in its twelfth year. Thirty-six members of the judiciary of the State of New York have passed (some several or more times), upon the substantive issues involved. Many others have been concerned with col-

lateral and procedural questions which have arisen. The case has occasioned nine different opinions and decisions on the substantive issues alone.

The question arises as to why this case has persisted so long, especially in view of the apparent commonplace nature of the issues and the fact that costs and counsel fees may well have exceeded the sum that either litigant can hope to gain or lose by a favorable decision. The case has persisted because petitioner, Harry Reoux, has never in a truly meaningful sense had his day in court. He was denied this right by the action of respondent and her counsel in suppressing evidence that would have conclusively proved his case, at the one point in time when it could have had such an effect. Petitioner has thus persisted in this litigation because he believes, as a matter of principle and law, that he has been morally and legally wronged, and because he believes that the same judicial processes which have served as a vehicle for perpetration of this wrong should also serve as a vehicle for purging and correcting the wrong.

However, this case has more to recommend it to this Court than the fact it has lasted a long time and has been wrongly decided. It is important in a larger sense because it provides this Court with an opportunity to speak out on the ethical obligations of counsel in a case which has occasioned much publicity and notoriety within the New York legal community. It provides the Court with a seldom seen opportunity for it to interpret the Canons of Professional Ethics, and to enunciate principles of ethics to guide counsel in the conduct of their case.

II.

In order to evaluate the effect of the suppression of material and crucial evidence by respondent's counsel, it is necessary to consider the suppression in the context of the events occurring at that time. The issue before the trial court in 1955 on respondent's counclaim was whether the September 19, 1953 transfer of securities from Mrs. Reoux to her son Harry was a "free and voluntary" gift.[2] At the time of the trial, Mrs. Reoux was eighty-two years old, weakened by the effects of arteriosclerosis, and was living with her daughter and son-in-law. Her testimony at the trial was extremely confused and contradictory. She denied, however, that she intended the securities to be a gift, testifying that petitioner forced her, against her will, to transfer them to him. Counsel for respondent then introduced into evidence the July 21, 1953 Will which divided Mrs. Reoux's estate equally between petitioner and his sister. Mrs. Reoux did not repudiate this Will, nor did she (or her attorney) call to the court's attention the fact that she had made the November 9, 1953 disinheriting Will, or to the fact of the existence of the letter of even date explaining the disinheritance. Her attorney continued this deception in spite of the fact that under New York law, Deced. Est. Law, Art. 2, § 34 (McKinney's Consol. Laws), the July 21, 1953 Will was revoked and a legal nullity.

---

[2] The new trial was limited to the counterclaim, the subject of which was the September 19, 1953 securities transfer, since the newly discovered November 9, 1953 letter would only have probative force going to show a free and voluntary gift of these securities, and would not have such effect with respect to the April 1, 1954 securities, which were later in time than the November 9, 1953 Will and which were the subject of the original complaint.

Petitioner introduced at trial the letter dated August 2, 1954, written by Mrs. Reoux shortly after petitioner had requested that she complete the transfer of the April 1, 1954 securities, which letter is set out, *supra*, p. 8. Mrs. Reoux's statement in the letter that "I never intended giving you any more than you already had", standing alone, did not convince the Appellate Division when the case was before it the first time that the "you already had" language embraced the September 19, 1953 securities. This despite the fact that Mrs. Reoux referred in her letter to the "Imperial Stock" she had given petitioner "last fall", which stock had been a part of the September 19, 1953 transfer. This ambiguity would not have persisted had the Will and letter of November 9, 1953 been before the court.

Had the November 9, 1953 Will—Mrs. Reoux's only legal and subsisting Will—been introduced at the first trial, the November 9 letter explaining the disinheritance would have also come out. This letter clearly indicated that Mrs. Reoux intended the September 19, 1953 stocks and bonds to be a gift to Harry Reoux, especially when considered cumulatively with the August 2, 1954 letter. Further, if the Will and letter had been introduced the testimony of the attorney recommended by the bank who drew the Will and who prepared the letter would have come out. He testified at the second trial that the reason Mrs. Reoux gave him for disinheriting her son was that "she had made previous gifts to him, I gathered in substantial amounts." (R. 73).

The Will and letter were written in the presence of Mrs. Reoux's daughter, Mary Beswick, and this took place in the trust office of the Glens Falls National

Bank. (R. 73). There was no possible way that petitioner could have been influencing his mother at that time. She was under the direct influence and control of her daughter. Yet she freely admitted in that letter that the September 19, 1953 securities were intended to be a gift. Her words can have no other import. The result of the suppression of the November 9, 1953 Will and letter is the reason for this petition. By purposefully withholding this Will from the court, counsel for petitioner prevented the court from knowing about the November 9 letter, and about the disinheritance. The courts thereafter acted upon the assumption that Mrs. Reoux intended to divide her estate equally between petitioner and his sister. This was a patently false assumption, as counsel for respondent well knew.

Had the Will come out, petitioner's counsel could have confronted Mrs. Reoux with the letter and the Will. Her testimony denying a gift would thus have been impeached and the true character of the proceedings would have come to light, *i.e.*, that petitioner's sister and brother-in-law had been influencing Mrs. Reoux to distribute her assets to them and to disinherit petitioner; that Mrs. Reoux intended the September 19, 1953 transfer to be a gift, but that her disposition of mind had been influenced contrariwise prior to trial. Since, however, the existence of this Will did not come out until several years later when petitioner contested his mother's Will after her death, petitioner was deprived of the opportunity to bring out into the open *at the one point in time when he could have proved his case* the Will, the letter, the testimony of the drafter of the Will and letter, and the actions of his sister and brother-in-law. It is apparent also from the second decision of the Court of Appeals that the new

trial granted by the Appellate Division, after the evidence came to light, did not cure the false impression induced by the suppression of the Will and the letter. Mrs. Reoux's testimony concerning the voluntariness of the September 19, 1953 transfer was not read into the record at the new trial. In view of the dubious accuracy of Mrs. Reoux's original testimony, and in view of counsel's actions in procuring it, his reticence to place her previous testimony in the subsequent record, in the face of the new evidence, is readily understandable. Thus petitioner did not actually ever have his day in court, and was permanently forclosed by counsel's deceit from proving the voluntary nature of his mother's gift by clear and unambiguous evidence.

III.

The Canons of Professional Ethics of the Judiciary Law of the State of New York read in part as follows:

> *Candor and Fairness*
>
> It is unprofessional and dishonorable to deal other than honestly with the facts . . . in the presentation of causes. Canon 22, Jud. Law, Appendix at 771 (McKinney's Consol. Laws).

The Fourth paragraph of the Oath of Admission of the Bar of the State of New York reads:

> I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law.

New York also has passed legislation making it a crime for an attorney to deceive a court. The relevant statute reads:

An attorney or counselor who:

> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or . . . .
>
> Is guilty of a misdemeanor . . . Penal Law, §273 (McKinney's Consol. Laws).

These provisions are typical of those found in many state codes. (*E.g.*, D. C. Code, § 11-1302 (1951); Iowa Code, § 610.15 (1946). See generally, 52 Colum. L. Rev. 1039, 1041). They reflect the consensus of the members of the bars, legislatures and courts of this country as to the ethical obligations of counsel in presenting their causes. Of course, as stated they are just general, somewhat abstract principles. They take on flesh and meaning only in the context of actual cases. Because of their generality and abstractness, an attorney is oftentimes placed in a quandry in discerning his actual obligations under the law. He must look to his own conscience and the pronouncements of the courts and bar associations for guidance. However, these too are often uncertain guides. This Court has in this case an opportunity to give meaning and content to these general principles through the medium of interpretation as they apply to the facts of this case, and through enunciating the Court's interpretation of the principles guiding counsel generally in the presentation of their cases before any judicial tribunal, state or federal.

Courts are entitled to rely upon the accuracy of any statement of relevant fact made by those appearing before them and those appearing before courts have, at the very least, the responsibility not to hinder the

administration of justice. *Nilva* v. *U. S.*, 227 F.2d 74 (8th Cir. 1955). The stifling or suppression of evidence, *Harkin* v. *Brundage,* 13 F.2d 617 (7th Cir. 1926), or the submission of only a partial statement of facts where it is known to be such, *Matter of V.*, 42 N.Y.S. 268, 10 App. Div. 461, are types of misconduct which have been held to reasonably have the effect of deceiving or misleading a court in an action pending before it. An attorney is to be held strictly accountable for his statements or conduct which would have the effect of misleading or deceiving a court. *Matter of Rotwein,* 247 N.Y.S.2d 775, 777. See also, Drinker, *Legal Ethics,* p. 74. Whatever the device employed, the deliberate effort on the part of a lawyer to mislead the court, in a material manner, whether by misrepresentations, unfair and evasive tactics, or other irresponsible means, has the tendency to obstruct justice and there can be no justification for such conduct. *In re Schildhaus,* 259 N.Y.S.2d 631.

Deception is known by its effect—a judgment procured and perverted by a mistaken apprehension of the facts or the law. That the Courts of New York were deceived by the suppression of the November 9, 1953 Will is apparent from their opinions. The Appellate Division relied heavily upon the supposed "share-equally" distribution thought to exist because of the July 21, 1953 Will. In granting petitioner a new trial, the Appellate Division stated, in reference to this July 21, 1953 Will, that

> this Court said that plaintiff proved no agreement between the plaintiff and the defendant bearing upon the equal distribution of the defendant's property between her children in her lifetime, but

> the Court then held that, in any event, the defendant had substantially complied with any alleged agreement respecting the division of her estate by the terms of the will of July 21, 1953, wherein she divided her residual estate between plaintiff and his sister. *A finding . . . to that effect was made at the request of the defendant who knew that a new will leaving everything to the daughter and her family and the letter of explanation, the subject of this motion, had been executed by her on November 9, 1953.* (Appendix D, at 13a). (Emphasis added.)

The decisions of both Special Term and the Appellate Division made after the new trial clearly reference the effect the suppression had on the previous proceedings. (Appendix B, at 4a; C, at 8-9a). The effect of the suppression is apparent beyond peradventure. It constituted a fraud and deceit on the New York courts and infected the proceedings with error that still has not been purged.[3]

IV.

It is petitioner's contention that the action of respondent and her attorney in suppressing the crucial

---

[3] It is interesting to note also in this regard that respondent's counsel urged the courts to believe, during the course of the several proceedings, that the defendant, Mrs. Reoux, was incompetent on September 19, 1953, competent on November 9, 1953, incompetent on April 1, 1954, and competent during the period from August of 1954 to and including October of 1955 (the time of the first trial). It is not surprising that the alleged periods of incompetency coincide with actions taken by Mrs. Reoux favorable to petitioner, and those alleged periods of competency represent occurrences detrimental to petitioner's cause.

evidence deprvied him of a fair trial. It is true that their actions, standing alone, perhaps do not rise to constitutional dimension. The missing element to give petitioner's cause such dimension and to raise his claim to the dignity of a denial of due process of law guaranteed to him by the Federal Constitution was supplied by the Court of Appeals of the State of New York by its reinstating the first decision, infected as it was with fraud and deceit. That decision was procured by an officer of the courts of the State of New York, who was joined in his fradulent and deceitful conduct by both Mrs. Reoux and her heirs, who are the real respondent parties in interest before this Court. Just as a defendant is denied due process of law guaranteed to him by the Fourteenth Amendment to the United States Constitution where the state court judge is prejudiced against him, *Tumey* v. *Ohio,* 273 U.S. 510; just as a defendant is denied due process of law where state officials permit mob rule to take the place of an orderly trial, *Moore* v. *Dempsey,* 261 U.S. 86; and just as a defendant can be deprived of due process of law by the actions of prosecuting officers on behalf of the State, *Mooney* v. *Holohan,* 294 U.S. 103; so to a petitioner is denied his constitutionally guaranteed right to due proces of law where a state court reinstates a decision procured by the fraudulent and deceitful actions of an officer of such state courts.

In finding against petitioner and in reinstating the prior decision, the Court of Appeals placed great emphasis upon the "burden" placed upon petitioner as attorney and son to prove that the gift made by his mother to him was free and voluntary. However, the Court ignored the fact that petitioner was not serving his mother down through the years as an attorney, in

the normal sense of that word. He was serving her as a son, and as a conservator and builder of her estate. Certainly his actions were infected by self-interest, as would have been the actions of any man, attorney or not, under the circumstances. However, this apparent self-interest caused petitioner to be scrupulously fair in his dealings with his mother, and precise in his accountings. (R. 33-34). It did not lead him to any unprofessional conduct, either in her behalf, or against her interest. It is anamolous in the extreme that petitioner, who was deprived of a decision in his favor more than eight years ago by the actions of an attorney, now finds himself deprived again of a decision in his favor by the action of the Court of Appeals in placing upon him a strict and heavy burden of proving that the gift to him was free and voluntary because he himself was an attorney. It is further anamolous that petitioner should be deprived of any share in the estate which he, more than any other person, built and conserved, and that this estate should pass entirely to his sister, her children, and indirectly to her attorney husband, who himself had advised and acted for Mrs. Reoux in legal matters.

This Court has recently stated, in another context, that "court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial". *Estes* v. *Texas,* 381

U.S. 532, 540. The truth of what has occurred in this case is now apparent.

WHEREFORE, the petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

PEYTON FORD
Attorney for Petitioner

Of Counsel:

FORD, AYER AND HORAN
1000 Connecticut Avenue, N.W.
Washington, D. C.

JAMES C. STRANEY
3 Gaffers Court
Latham, New York

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

HARRY A. REOUX, *Respondent,*

v.

THE FIRST NATIONAL BANK OF GLENS FALLS, as Executor of the Estate of Adelia H. Reoux, Deceased, *Appellant.*

PER CURIAM:

The order should be reversed with costs in all courts and judgment of the Supreme Court, Warren County, entered December 3, 1957, in favor of defendant insofar as it grants recovery on the counterclaim should be reinstated. The law of the case is that plaintiff, Harry Reoux, acting as both an attorney and as a son, had the burden of establishing by "clear and satisfactory" evidence that the transfer of the securities in question was a "valid and voluntary gift" on the part of his mother, a burden which he failed to meet (3 A D 2d 560, affd. 4 N Y 2d 1022).

The newly discovered evidence consisted only of the will dated Nov. 9, 1953, disinheriting plaintiff and a letter of even date explaining the disinheritance. These documents in no way refute plaintiff's own admissions of undue influence and overreaching, nor do they reveal any donative intent on the part of the mother as to the securities in question.

• • •

Order reversed with costs in all courts and judgment of Supreme Court, Warren County, entered December 3, 1957 in favor of defendant on the counterclaim reinstated insofar as it grants recovery thereon.

Opinion Per Curiam. All concur; Bergan, J. taking no part.

APPENDIX B

Decision of Appellate Division.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

July 7, 1964.

HARRY A. REOUX, *Respondent*,

v.

THE FIRST NATIONAL BANK OF GLENS FALLS, as Executor of the Estate of Adelia H. Reoux, deceased, *Appellant*.

6371

PER CURIAM:

Defendant executor appeals from a judgment of the Supreme Court after a trial before the court without a jury.

In 1954 respondent sued his mother to compel her to complete the transfers to him of certain stock certificates which he had removed from a safe deposit box with her permission. The gravamen of his complaint was that the transfers in question stemmed from an oral agreement between him and his parents made in 1924 whereby he would receive one-half of their estates in consideration of his returning to Warrensburg after graduation from law school for the purpose of looking after their substantial business interests. Defendant mother counterclaimed for a judgment directing the return to her of other securities of the value of about $40,000 which had been reregistered in her son's name following their alleged gift to him on the 18th and 19th days of September, 1953. After a trial of the issues the late Mr. Justice Heffernan, acting as official referee, reported in favor of plaintiff. The Supreme Court confirmed his recommendation and directed defendant to execute the indorsements and assignments which he sought to compel.

Upon appeal we reversed, dismissed the complaint and granted judgment on the counterclaim (3 A. D. 2d 560). In effect we held that Reoux, acting in the confidential capacities of attorney and son, had overreached his mother in respect to the securities involved in both the claim and the counterclaim. We also said that plaintiff had not proved the agreement which we did not regard as the real issue and that in any case defendant by the terms of a will dated July 21, 1953 wherein she divided her residual estate between the plaintiff and his sister had substantially complied with any alleged agreement.

Mrs. Reoux died in 1958. A will dated November 9, 1953 in which she gave the residue of her property to a daughter and her children was admitted to probate following a trial of the objections interposed by plaintiff. This will was drawn by an attorney who had not previously represented her and who at the same time and at her direction had drafted a letter which read: "November 9, 1953. The First National Bank of Glens Falls, Glens Falls, New York. Gentlemen: By my Will of this date, I have made no provision for my son, Harry Reoux. My reason for this action is that I have made transfers of securities to him in my lifetime which, with his other assets, should adequately provide for him and his family. I have reached this conclusion without suggestion from anyone and as a result of considerable thought on my part. Very truly yours, Adelia H. Reoux." He also testified at the trial of the will contest: "Furthermore, she [testatrix] stated that she did not want to make any provision for her son Harry; that she had made various transfers of securities, investments and assets to him and she felt he was well provided for. * * * She told me that, again, she didn't want to leave anything to Harry, and expressed the same reasons that she had before, namely, that he was well provided for, and that she had made previous gifts to him, I gather in substantial amounts." The proof in the probate proceeding further disclosed that in August, 1954 defendant wrote her

son in reply to his letter concerning the stock certificates which were the basis of the complaint as follows: "August 2, 1954 Dear Harry: I have received your registered letter demanding that I turn over all of my stocks to you. You told me last winter that the paper you had me sign was for the Imperial and other stocks that I gave you last fall. I never intended giving you any more of my stock than you already had and I am not going to give you any more. Mother."

Upon a showing of these facts we granted plaintiff's motion for a new trial of the counterclaim in the interest of justice (16 A. D. 2d 543). Trial term has determined that the transfer of the securities by decedent to plaintiff in September, 1953 was intended to be a gift and that such was freely and voluntarily made. His decision is grounded principally on the probative force of the letter of November 9, 1953 corroborated by the subsequent letter of August 2, 1954 and the circumstances in which both were written.

Appellant contends that plaintiff's testimony on which defendant initially prevailed in this court requires the same conclusion now. This view overlooks the evidence newly discovered after the first trial consisting of the November 9 will, the testimony of its draftsman, the letter of the same date, the subsequent one dated August 2, 1954, and the evidence of deceased's testamentary capacity, all adduced for the first time at the trial of the will contest which, of course, postdated our prior decision. We think that the trier of the fact could find that this additional proof was sufficient to tip the scale in plaintiff's favor and on the record as now constituted that he had sustained the burden of proof cast upon him by reason of the confidential relationship which existed between him and his mother.

Judgment affirmed, with costs.

Herlihy, J. P., Reynolds, Taylor, Aulisi and Hamm, JJ., concur.

APPENDIX C

Opinion at Special Term.

STATE OF NEW YORK, SUPREME COURT,
WARREN COUNTY.

HARRY A. REOUX, *Plaintiff*,

v.

THE FIRST NATIONAL BANK OF GLENS FALLS, as Executor of the Estate of Adelia H. Reoux, deceased, *Defendant*.

Special Term:

Warren County Courthouse, Lake George, N. Y., January 2nd and 3rd, 1963.

Appearances:

Wood, Morris, Sanford & Hatt, Attorneys for defendant, 90 State Street, Albany, New York.

John S. Hall, Esq., Attorney for plaintiff, James C. Straney, Esq., of counsel.

SWEENEY, J.:

This is a retrial of an action which was originally commenced in August of 1954 by the plaintiff, an attorney, against his mother to compel her to transfer to him certain securities which he removed in September of 1953, with her permission, from the mother's safe deposit box at the Emerson National Bank in Warrensburg, New York. The plaintiff retained these securities, but they were not endorsed by the mother. The latter, in her answer after making certain denials to the complaint, interposed a counterclaim, demanding the return to her of certain other securities removed at the same time as those mentioned in the complaint. These securities, the mother had endorsed

and they were subsequently registered in the name of the plaintiff.

The mother died in 1958, subsequent to the original trial. Her will was contested and it resulted in a jury trial held in Supreme Court in Warren County in the Fall of 1959. Subsequently, the plaintiff sought a new trial of the original action because of newly discovered evidence brought out during the will contest. This newly discovered evidence consisted of a letter written by the mother the same day on which the will offered for probate was executed. The Appellate Division in *Reoux* v. *Reoux*, 16 A. D. 2d 543, granted a new trial. The new trial, however, related solely to the counterclaim. The First National Bank of Glens Falls, as Executor of the Estate of the mother has been substituted as defendant.

The retrial consisted mainly of reading into evidence excerpts of testimony of witnesses who testified at the original trial and in the will contest. Some of the testimony adduced at the first trial was not produced at this trial. In addition, there was proof offered at the present trial which was new. I am confined to the proof presented at the new trial, together with certain rulings of law which the Appellate Division had previously made and which were conceded to be the law of the case. The Appellate Division, in granting the new trial, took great pains to point out that any observations made by it in granting the new trial were not determinative of the issues upon a retrial. Consequently, the result of the retrial depends upon the conclusions reached by me as the trier of the facts from all of the proof presented at such retrial.

Defendant contends that the proof produced on the retrial indicates that the transfer of the stocks in question did not constitute a gift freely and voluntarily made, but resulted from the influence and coercion exerted by the plaintiff upon his aged mother while he was acting in a son-mother, lawyer-client relation with her. Defendant

further maintains that the letter of November 9, 1953 which accompanied the execution of the will of that date and which was the newly discovered evidence upon which the Appellate Division granted a new trial, does not debilitate its contention.

Plaintiff contends that the transfer of the securities in question was voluntarily and freely made. He further maintains that the letter of November 9, 1953 not only supports this contention, but also re-affirms the original gift.

The sole question to be determined is whether or not the proof offered on the retrial is sufficient to establish a free and voluntary gift of the securities in question.

Since we are dealing solely with the counterclaim, the burden is on the defendant to prove that the securities in question were not voluntarily given, but that the transfer was in fact made involuntarily because of fraud and duress. I should add, however, that due to the confidential relationship of the parties, it would require little proof to shift this burden to the plaintiff and place on him the onus of establishing that the transfer was freely made.

There appears from the testimony that up to a certain time, the defendant-mother had contemplated leaving the residual of her estate to the plaintiff and the plaintiff's sister. A will executed as recently as of July 21, 1953 followed this pattern. There is also evidence in the record that subsequent to the death of the father in 1938 the defendant-mother made gifts to both her son and daughter. During these years the plaintiff often acted as attorney for his mother. He was not the sole attorney, however, for the will which was ultimately admitted to probate was drawn by another attorney. The record also indicates that the plaintiff's sister's husband, an attorney, represented the defendant-mother from time to time.

There came a time in September of 1953 when the plaintiff learned that his mother had made substantial gifts of

securities to his sister. At about this time the securities in question were removed from the safe deposit box with the mother's written permission, and shortly thereafter, they were endorsed to the plaintiff by the mother. At this particular time, the mother was recuperating from a recent illness and was residing with the plaintiff. Soon thereafter, she left plaintiff's residence to reside with the sister. It was during the period that she was residing with the sister that the sister's attorney husband took the mother to an independent attorney to have the will drawn which ultimately turned out to be the one which was admitted to probate. This will was executed on November 9, 1953. This was some two months subsequent to the time the mother endorsed the securities in question to the plaintiff. On this very date the mother wrote a letter explaining why she did not make any provision in the will for the plaintiff-son. This letter is the chief reason for the Appellate Division's granting the new trial. The letter reads as follows:

> "November 9, 1953. The First National Bank of Glens Falls, Glens Falls, New York. Gentlemen: By my Will of this date, I have made no provision for my son, Harry Reoux. My reason for this action is that I have made transfers of securities to him in my lifetime, which with his other assets, should adequately provide for him and his family. I have reached this conclusion without suggestion from anyone, and as a result of considerable thought on my part. Very truly yours, Adelia H. Reoux. Witnesses: B. W. Francis, A. D. Clark."

On August 2, 1954, the mother also wrote a letter to the plaintiff in reply to one he had written her. These two letters, plus the new will, viewed as a whole, are most significant. The August 2nd letter reads as follows:

> "August 2, 1954. Dear Harry: I have received your registered letter demanding that I turn over all of my

stocks to you. You told me last winter that the paper you had me sign was for the Imperial and other stocks that I gave you last fall. I never intended giving you any more of my stock than you already had and I am not going to give you any more. Mother."

This latter letter refers to certain stocks that the mother had transferred to the plaintiff, including the Imperial stock which is involved in the counterclaim, and it states that they were given "last fall", which would be the fall of 1953, the time when the plaintiff contends the stocks in question were given to him.

I conclude that the letter of November 9, 1953 indicates that the mother was aware that she had transferred these securities to the plaintiff-son and intended them as a gift. On that day there could have been no influence exerted on behalf of the plaintiff. He was not there. On the contrary, the sister was present. The will made on this same day was drawn within two months after the transfer in question. In so far as the son was concerned, it was totally inconsistent with this previous will because it made no provision for plaintiff. This leads me to conclude that the mother intended the September, 1953 securities transfer to be the manner in which she was providing for her son. This conclusion is further substantiated by the testimony of the attorney who prepared this final will and who testified that he understood the mother had made previous substantial gifts to the son.

This conclusion I reach is further corroborated by the letter of August 2, 1954. Here again the mother is not under the influence of the plaintiff. She is making her home with the sister. She refers to the transfer of the stock in question, specifically mentioning the Imperial stocks as the stocks "I gave you last fall" (1953). How easy it would have been for her to say, "You took these stocks from me and I want them returned," or "I never intended you to have them". It appears to me her in-

tention was just the opposite. She had, since the transfer of these stocks in September, 1953, performed three separate and distinct acts which, when taken together and examined in light of all the circumstances, strongly indicate to me that she desired the plaintiff to have the securities in question. First, she engaged a disinterested lawyer and prepared a new will by which she left nothing to the plaintiff-son. Secondly, she carefully explained this act to the Executors, and finally, she wrote the letter of August 2, 1954, again referring to the securities, some of them by name, as gifts.

I conclude therefore, from all of the proof and particularly these last mentioned acts, two of which were done with the aid of counsel and all of which were done at a time when she was not under the control of the plaintiff, that the mother, in her own mind, had finally straightened out once and for all the disposition of her property and intended to let the matter end there.

In summary, I conclude on this record that the transfer of the securities to plaintiff in September of 1953 was intended to be a gift, and further that it was freely and voluntarily made.

At the trial defendant objected to the admission of certain proof on the ground that SECTION 347 OF THE CIVIL PRACTICE ACT WAS VIOLATED. There were several such incidents. The defendant had a continuing objection and the Court, in each case, reserved. I now sustain the objection. I did not consider this testimony in my decision.

Counterclaim dismissed on the law and on the facts.

The above constitutes the signed decision upon which judgment may be entered, in accordance with Section 440 of the Civil Practice Act.

Dated: June 29th, 1963.

MICHAEL E. SWEENEY
J. S. C.

APPENDIX D

16 A.D.2d 543

HARRY A. REOUX, *Appellant*,

v.

THE FIRST NATIONAL BANK OF GLENS FALLS, as Executor of the Last Will and Testament of Adelia H. Reoux, deceased, *Respondent*.

Supreme Court, Appellate Division, Third Department.

June 28, 1962.

* * * * * * * * * * *

James Clayton Straney, Latham, for plaintiff-appellant.

Morris, Dillon & Schrade, Albany (Ernest B. Morris, Albany, of counsel), for defendant-respondent.

Before BERGAN, P. J., and COON, GIBSON, HERLIHY and REYNOLDS, JJ.

PER CURIAM.

The action concerned a dispute between the plaintiff and his mother regarding the validity of certain alleged transfers of various stock certificates. Such issues, as relate to the complaint itself, are not before the court on this motion, and we accordingly direct our attention to the facts having to do with the counterclaim.

The record shows that subsequent to the death of the husband and father of the parties, a well defined testamentary plan was established by the mother to treat her son and daughter on equal terms. In 1953 this pattern changed and arguments arose which resulted in bitter and protracted litigation, of which this action is a facet.

In July of 1953, while the defendant mother was residing in a nursing home, she executed a Will which plaintiff had prepared. Following the pattern of former Wills, the residue was divided equally between her plaintiff son

and daughter. In September, while living at the home of the plaintiff, she transferred to him certain certificates of stock which were the basis for the counterclaim. In November, having left the home of her son and returned to the home of her daughter, she had a new Will drawn by an attorney who had not previously represented her and which Will, dated November 9, 1953, left the residue to her daughter and her heirs. At the same time she had the attorney draft a letter, which is the basis for this motion. The letter reads as follows:

> "November 9, 1953, The First National Bank of Glens Falls, Glens Falls, New York. Gentlemen: By my Will of this date, I have made no provision for my son, Harry Reoux. My reason for this action is that I have made transfers of securities to him in my lifetime, which with his other assets, should adequately provide for him and his family. I have reached this conclusion without suggestion from anyone, and as a result of considerable thought on my part. Very truly yours, Adalia H. Reoux. Witnesses: B. W. Francis, A. D. Clark."

The plaintiff alleges he first had knowledge of this letter on October 27, 1959, after the death of his mother and long subsequent to our original decision, dated May, 1957.

The decision of this court made no distinction between the cause of action alleged in the complaint and the cause of action alleged in the counterclaim.

On the original trial of this action, the plaintiff attempted to prove a binding agreement between him and his mother and father whereby he was to receive one-half of their estate. We said that if there had been any agreement, as alleged by the plaintiff, the Will of July, 1953 substantially carried out the terms thereof. We further determined that there had been overreaching and the violation of a confidential relationship on the part of the plaintiff. The

Referee had refused to make such findings as to the counterclaim.

[1] The question then is: If the letter, which is the basis of this motion, had been before the court at the time of its original decision, what effect would it have had on the said decision? To grant a new trial, under the circumstances herein, there must be a showing that the evidence is material as to the merits of the case and that it is reasonable to suppose that the conclusion of the court would have been otherwise if this evidence had been before it at the time of its decision. Cassab v. Hees, 261 App.Div. 1115, 27 N.Y.S.2d 179.

This court said that plaintiff proved no agreement between the plaintiff and the defendant bearing upon the equal distribution of the defendant's property between her children in her lifetime, but the court then held that, in any event, the defendant had substantially complied with any alleged agreement respecting the division of her estate by the terms of the Will of July 21, 1953, wherein she divided her residual estate between the plaintiff and his sister. A finding* to that effect was made at the request of the defendant who knew that a new Will leaving everything to the daughter and her family and the letter of explanation, the subject of this motion, had been executed by her on November 9, 1953. While the findings of this court were warranted by the record as then constituted, they were, as disclosed by subsequent events, erroneous. We said the alleged oral agreement was not the real issue involved and accordingly, the decision relating thereto might be considered dictum. However, the determination of that issue may have influenced the decision of this court. It follows that, in the interest of justice, the finding, while not controlling, must be given consideration in determining the motion.

---

*"11. If any such oral agreement was made in 1924, defendant subsequently complied with that agreement by the Will set forth in full in the record, which she made on June (sic) 21, 1953".

The basic reasons for this court's dismissal of the counterclaim were findings that a confidential relationship existed between the parties and that the acts of the plaintiff, under the circumstances, amounted to undue influence and overreaching on his part. After permitting a reargument, this court adhered to its original decision (4 A.D.2d 805, 165 N.Y.S.2d 722).

It is not disputed that at the time the letter of November 9, 1953 was written, the defendant was not under the influence of the plaintiff. The attorney, who prepared the letter, testified at a subsequent will contest trial: "Furthermore, she stated that she did not want to make any provision for her son Harry; that she had made various transfers of securities, investments and assets to him and she felt he was well provided for." Further, he stated: "She told me that, again, she didn't want to leave anything to Harry, and expressed the same reasons that she had before, namely, that he was well provided for, and that she had made previous gifts to him, I gather in substantial amounts." These statements, together with the additional testimony offered as to the testamentary capacity of Mrs. Reoux, affirm the fact that if she were competent to make the Will of November 9, 1953, she was equally competent on the date to "reaffirm" the transfer of securities, the subject matter of the counterclaim. It seems apparent that the defendant realized that the Will of November 9th was a substantial departure from the pattern previously adhered to and the letter of the same date was an explanation for the change, to wit, that she had transferred to plaintiff securities within a relatively short period of time.

Subsequently in August, 1954, when the plaintiff wrote to the defendant concerning the stock certificates, which were the basis of the complaint, she replied as follows:

> "August 2, 1954 Dear Harry: I have received your registered letter demanding that I turn over all of my stocks to you. You told me last winter that the paper

you had me sign was for the Imperial and other stocks that I gave you last fall. I never intended giving you any more of my stock than you already had and I am not going to give you any more. Mother."

This letter was written while defendant was living with her daughter and when read in context with the letter of November 9, 1953 would seem to be a further reaffirmance of the gift of the subject matter of the counterclaim. It appears undisputed in the present record that the only securities given to the plaintiff by the defendant prior to September, 1953 totaled $9,500.00.

Without the letter of November 9, 1953 and the conversations of the attorney who prepared the letter quoted above, the letter of August 2, 1954 would not have the same impact. It is undisputed that the Imperial stock had been given by the defendant to the plaintiff in September, 1953 and was one of the stocks sought to be recovered in the counterclaim.

[2] The letter, which is the basis for this motion, might, upon a new trial, lead to a different result. It is of strong probative force and tends to contradict the testimony of Mrs. Reoux concerning the transfer of securities. On a motion of this kind, of necessity we must make observations as to the purported new evidence, but such observations are not to be considered as determinative of the issues upon a retrial. Upon a new trial, the introduction of the letter might conceivably have no effect or it might be determined from it that there was no overreaching or that if there had been overreaching, the letter, written when the defendant was under no force or duress, was intended to forgive any acts of the plaintiff and to reaffirm the gift of the stock certificates. It is our considered opinion, that where such doubt exists, it constitutes the basis for the granting of a new trial within the framework of the rule enunciated in Collins v. Central Trust Co. of Rochester, 226

App. Div. 486, at page 488, 235 N.Y.S. 511, at page 515, where the court said:

> "The fundamental and underlying test to be applied to motions of this character is whether the newly discovered evidence is of such a nature, and is so positive and convincing, that it will, in all probability, produce a different result, if a new trial is had."

We recently granted a new trial, in the interest of justice, where there was some doubt as to whether plaintiff had knowledge of an alleged material witness, known to both defendants, but who failed to produce the witness at the trial. Brinkman v. Brinkman, 15 A.D.2d 587, 221 N.Y.S. 2d 836. Here, we have documentary evidence in the possession of the defendant, but not within the knowledge of the plaintiff at the time of the original trial and not before this court on the appeal therefrom.

In Hyman v. Dworsky, 239 App.Div. 413, at page 419, 267 N.Y.S. 539, at page 546, this court said: "Newly discoverd evidence contradicting the evidence of a witness upon a material issue is in general sufficient ground for applications of this sort."

The executor further contends that the motion should be denied because of the laches of the plaintiff. Concededly there was considerable delay between the time the plaintiff first acquired knowledge of the letter and the motion for a new trial, but because of the unusual and exceptional circumstances alluded to and in the interest of justice, we are constrained to overlook the delay.

In Harago v. Commonwealth Bank, 136 Misc. 735, 739, 240 N.Y.S. 430, 435, Mr. Justice Frankenthaler observed:

> "But even if he has not moved in the matter with diligence, his case is one in which the interests of justice require a new trial. Frohlich v. Zeltzer, 185 App.Div. 103, 110, 173 N.Y.S. 15, [18]. The comments of the court in Platt v. Munroe, 34 Barb. 291,

294, are quite appropriate here: 'The books are full of exceptional cases, in which development of truth and the promotion of substantial justice have been deemed sufficient reasons for granting new trials, although they were not within any former precedent, and consequently not within the operation of any principle or rule established for the guidance of the courts in the exercise of their discretion.' "

See also: Schnur v. Cohen, 152 Misc. 676, 273 N.Y.S. 996; Stephens v. Stephens, 5 A.D.2d 962, 171 N.Y.S.2d 729; Brinkman v. Brinkman, 15 A.D.2d 587, 221 N.Y.S.2d 836.

It has been aptly stated that "rules of law are intended to serve and not to frustrate the ends of justice". Schnur v. Cohen, supra, page 678, 273 N.Y.S. page 999.

The litigation involving the Reoux family has multiplied into many facets and forms and there should be finality to it all without further delay. Courts do not sanction such long and protracted litigation, especially between members of a family, and the issues hereto should be determined forthwith by way of an amicable settlement or a speedy trial.

We determine that, in the interests of justice, the motion for a new trial should be granted.

The order of Special Term should be reversed, on the law and the facts, and the motion for a new trial granted, with costs to abide the event.

Order of the Special Term reversed, on the law and the facts, and motion for new trial granted, with costs to abide the event.

Within the terms of the stipulation heretofore filed the case is referred to Hon. Harry E. Schirick, Official Referee, to hear and determine.

BERGAN, P. J., GIBSON and HERLIHY, JJ., concur.

COON and REYNOLDS, JJ., dissent and vote to affirm.

APPENDIX E

HARRY A. REOUX, *Appellant*,

v.

ADELIA H. REOUX, *Respondent*.

Argued May 9, 1958; decided June 25, 1958.

[Reporter's Summary, 3 N.Y.2d 940]

APPEAL from a final judgment of the Supreme Court in favor of defendant entered December 3, 1957, in Warren County upon a report of a referee (John J. Conway, Ref.), following an order of the Appellate Division of the Supreme Court in the third judicial department which (1) reversed, on the law and facts, a judgment of the Supreme Court in favor of plaintiff, also entered in Warren County upon a decision of an Official Referee (Christopher J. Heffernan, Off. Ref.), (2) dismissed the complaint, (3) granted judgment to defendant on her counterclaim, and (4) directed plaintiff to account for any sales of securities and any dividends or interest. Stated findings of fact and conclusions of law contained in the decision of the Official Referee were reversed and new findings and conclusions made by the Appellate Division in lieu thereof. The action was commenced to compel defendant to complete, by the execution of assignments, a transfer to plaintiff of shares of stock and bonds owned by defendant. Plaintiff alleged in the complaint that the transfer was effected by an agreement in writing dated April 1, 1954. In his bill of particulars, plaintiff alleged that the consideration for the agreement was another agreement made by defendant and her then husband in 1924, whereby in exchange for the rendition of legal and other services by plaintiff, their son, to them they agreed to give plaintiff and his sister half of their estate. By her answer, defendant alleged that her signature to the agreement of April 1, 1954 was obtained by fraud while she was convalescing from a serious illness.

By a counterclaim, defendant alleged that she was 81 years of age, that in September, 1953 she was recovering from a stroke, that she owned certain shares of stock and certain bonds kept in a safe-deposit box in a bank in Warrensburg, that defendant was coerced into authorizing plaintiff to enter her safe-deposit box, that thereafter she was forced to transfer certificates of shares of named stocks different from those referred to in the complaint to him, that when she left plaintiff's home in November, 1954 she discovered that plaintiff had taken all her securities, and that plaintiff refused to return them. She demanded a declaration that the agreeemnt of April 1, 1954 was void, and that the transfer of the shares of stock mentioned in the counterclaim was void, that plaintiff return all her securities and that plaintiff account for dividends and the value of any stocks he was unable to restore. Defendant's will, executed on July 21, 1953, divided her residuary estate equally between plaintiff and his sister. The appellate Division stated that: "The real issue is whether plaintiff, acting both as an attorney and as a son, obtained from his mother the possession of stocks and bonds under circumstances that amounted to undue influence and overreaching on his part. We cannot find from the record any evidence that defendant was legally obligated to transfer to the plaintiff any of the securities involved in either the plaintiff's claim or the counterclaim of the defendant, and such being the case the transfers involved take on the aspect of gifts. * * * Where a confidential relationship exists between parties a valid gift must be established by evidence that is clear and satisfactory. * * * He * * * was bound by the highest punctilios of honor, in view of the fact that he was acting for the defendant both as her son and as her attorney, to see to it that the defendant was meticulously advised as to her rights and duties. That burden became his from the very nature of the confidential relationship that existed between them, and especially so in view of her age and condition. * * * he failed to sustain

that burden. By his own admission he advised her on several occasions that there was a valid and subsisting agreement on her part to convey to him one half of her property. There is no indication that he limited this advice to the proposition that she had agreed to make a will in his favor."

M. James Conboy and Edward L. Bookstein for appellant.

Ernest B. Morris and John R. Davison for respondent.

Judgment affirmed, with costs; no opinion.

Concur: Chief Judge Conway and Judges Desmond, Dye, Fuld, Froessel, Van Voorhis and Burke.

APPENDIX F

Opinion for Reversal

SUPREME COURT, APPELLATE DIVISION—THIRD DEPARTMENT

HARRY A. REOUX, *Plaintiff-Respondent,*
against
ADELIA H. REOUX, *Defendant-Appellant.*

Argued March, 1957.

Decided April, 1957.

Before:
Hon. Sydney F. Foster, Presiding Justice,
Hon. Francis Bergan,
Hon. William H. Coon,
Hon. Philip Halpern,
Hon. James Gibson, Associate Justices.

Appeal from a judgment of the Supreme Court, entered upon the decision of an official referee (Heffernan, O. R.), which directed defendant to endorse or assign certain stock and bond certificates, and dismissed her counterclaim for the return of certain stocks.

McPhillips, Fitzgerald & McCarthy, Attorneys for Plaintiff-Respondent, Office and P. O. Address, 286 Glen Street, Glens Falls, New York (C. E. Fitzgerald and Thomas J. McCarthy, of Counsel).

Morris, Dillon & Mac Harg, Attorneys for Defendant-Appellant, Office and P. O. Address, 91 State Street, Albany, 7, New York.

Per Curiam.

Defendant appeals from a judgment of the Supreme Court, entered upon the report of an official referee, which directed defendant to deliver to the plaintiff endorsements or assignments of certain stocks and bonds, said to have an approximate value of $45,000, which were included in a bill of sale executed by the defendant on the 1st day of February, 1954. The judgment also dismissed a counterclaim of the defendant which sought a judgment directing plaintiff to return to her certain other securities said to have an approximate value of $40,000.

Plaintiff is a lawyer and son of defendant. It is his contention that the transfers in question stemmed from an oral agreement made in 1924, between him and his parents by which the latter agreed that upon the death of either or both of them he would receive one-half of their estates in consideration for his services in looking after their business interests and properties. After plaintiff's graduation from law school he returned to the home of his parents in Warrensburg, New York. Thereafter the testimony indicates that he performed many services in connection with the various interests and properties of his parents until his father's death in 1938. However in connection with at least one enterprise he received a salary, and in addition he was engaged in the practice of law, and a member of the Assembly for many years. After his father's death he continued to act for the defendant, his mother, in various matters. His father left by will his entire

estate to the defendant and plaintiff acted as her attorney, she being the executrix thereof.

In his bill of particulars plaintiff alleged that the oral agreement referred to provided in effect that he and his sister would share equally in all distributions made either before or after death in the property and estates of his father and mother. We do not find any testimony either by him or on his behalf which sustains this enlarged scope of the alleged agreement, and the Referee did not so find. The finding is simply that "both agreed that upon the death of either or both of them, the plaintiff would receive one-half of their estate, or both estates." This finding squares with the testimony of the plaintiff. The importance of this lies in the fact that whatever may be said as to the validity of the alleged agreement it was, on the plaintiff's own testimony, simply an agreement to make a will in his favor for one-half of the parents' estate. The only will set forth in full in the record is that of the defendant which she made on July 21, 1953, by the terms of which she left legacies of $7,000 to each of her two grandsons, directed the cancellation of a $10,000 note made by the plaintiff to her, and then divided her residuary estate equally between the plaintiff and his sister. Thus it would seem, irrespective of any question of fact as to the making of the alleged oral agreement or its legal validity, defendant subsequently complied with the very agreement which the plaintiff claims.

Defendant denies that the alleged oral agreement was ever made but in any event this question is not the real issue involved in the case. The real issue is whether plaintiff, acting both as an attorney and as a son, obtained from his mother the possession of stocks and bonds under circumstances that amounted to undue influence and overreaching on his part. We cannot find from the record any evidence that defendant was legally obligated to transfer to the plaintiff any of the securities involved in either

the plaintiff's claim or the counterclaim of the defendant, and such being the case the transfers involved take on the aspect of gifts. A gift of course, requires no consideration but on the other hand when questioned it must be shown to have been freely and voluntarily made. Where a confidential relationship exists between parties a valid gift must be established by evidence that is clear and satisfactory. Where parties do not deal on terms of equality it requires but slight evidence to shift to the donee the burden of proving by clear and satisfactory evidence that any transfer of property in question was free and voluntary on the part of the donor. (Starr v. Vanderheyden, 9 Johns. 253; Snook v. Sullivan, 53 App. Div. 602, affd. 167 N.Y. 536; Gick v. Stumpf, 126 App. Div. 548; Cassidy v. Cassidy, 285 App. Div. 1040.)

In the light of these simple principles we think the plaintiff failed to sustain the burden which was cast upon him by the confidential relationship that existed between him and his mother, and we reach this conclusion wholly from his own testimony. He obtained possession of the securities, which are the subject of his claim and also include those which are the subject of the defendant's counterclaim, by opening the defendant's safe deposit box by force. It is true that he had her written consent to do so, but this consent must be viewed in the light of the circumstances under which it was obtained. This happened in 1953 when defendant was about 80 years of age, and after she had been ill and confined in a nursing home. After she left the nursing home she went to the home of the plaintiff sometime in September, 1953. There a conversation ensued between herself and plaintiff concerning $40,000 worth of stock which was then in her safe deposit box in the Emerson National Bank in Warrensburg, N. Y. The parties disagree as to just what was said but in any event plaintiff obtained defendant's consent to open her box by force because she could not

locate the key to it, or didn't have it with her. Shortly after the opening of the box was forced and plaintiff took the securities into his possession she executed assignments of the securities that are the subject of the counterclaim herein. According to the testimony of the plaintiff himself she was at the time "somewhat vague and forgetful and uncertain about matters" and "her head seemed a little fuzzy."

Following this episode defendant executed while she was in Florida the bill of sale under which the plaintiff claims. This instrument was executed, according to the testimony of the plaintiff, after a discussion with the defendant concerning certain real estate which she had conveyed to the plaintiff's sister. It was drafted by a Florida attorney for the plaintiff but it is not claimed that the defendant was in any way represented by such attorney at the time. The bill of sale included all of the securities which plaintiff had removed from the defendant's safe deposit box and retained in his possession, except those which are the subject of her counterclaim and which she had previously endorsed or assigned to plaintiff.

From the whole record it appears that there was no financial discord between the plaintiff and defendant until some time in 1949. In that year plaintiff had apparently become resentful of gifts which defendant had made to his only sister and her children with whom the mother resided. There is no doubt that after the death of her husband the defendant from time to time made gifts of property to both the plaintiff and his sister. The plaintiff himself was given a house and lot which he estimated to be valued at $10,000; some shares of stock in the Emerson National Bank and also 100 shares of General Electric; and in addition was forgiven an obligation to pay a note for $10,000. The Referee tartly observed in his opinion: "Apparently both children were endeavoring to strip the mother of her property." But the Referee was

convinced that the daughter had enriched herself out of property to the detriment of her brother, and had imposed her will upon the mother. The Referee then concluded that when the defendant was freed from the domination of the daughter she made gifts of the securities in question here to the son in order to make an equitable distribution of her property. We take it that the Referee decided the case in favor of the plaintiff upon the ultimate theory that the transfers in question were freely and voluntarily made by the defendant because of course it was beyond his power to compel an equitable distribution, or as a matter of fact to make any finding with reference thereto. There is no proof in the record as to the value of any prior gifts made by the defendant to the daughter except that they did not equal those made to the plaintiff. We have no doubt that the Referee intended to equitably dispose of a distressing situation, and indeed it might be found that the plaintiff himself fully believed that he was entitled on an equitable basis to the securities in question but these matters are irrelevant to the decisive issues in the case, or at least have only a subordinate bearing upon them.

It is clear that the defendant had no legal obligation under the alleged oral agreement or otherwise to give the plaintiff anything during her lifetime. He, on the other hand, was bound by the highest punctilios of honor, in view of the fact that he was acting for the defendant both as her son and as her attorney, to see to it that the defendant was meticulously advised as to her rights and duties. That burden became his from the very nature of the confidential relationship that existed between them, and especially in view of her age and condition. As we have heretofore indicated we think he failed to sustain that burden. By his own admission he advised her on several occasions that there was a valid and subsisting agreement on her part to convey to him one-half of her

property. There is no indication that he limited this advice to the proposition that she had agreed to make a will in his favor. Although from his own observation she appeared to be vague and forgetful about matters he never suggested independent counsel either by way of business or legal advice. While the undertones of the record reveal a fued between plaintiff and his sister the lawsuit has to do of course with the rights of the defendant. Even if it should be found that the sister had unduly enriched herself from the defendant's estate that would not justify plaintiff from overreaching where he was acting as an attorney as well as son.

The judgment should be reversed and an order made directing judgment dismissing the complaint and granting the relief prayed for in the defendant's counterclaim.

APPENDIX G

Opinion of Official Referee.

STATE OF NEW YORK, SUPREME COURT,
WARREN COUNTY.

(Same Title.)

Appearances:

McPhillips, Fitzgerald & McCarthy (C. E. Fitzgerald and Thomas J. McCarthy of counsel), attorneys for plaintiff.

Morris, Dillon, Rezzemini & MacHarg, attorneys for defendant.

HEFFERNAN, O. R.:

This is an action by plaintiff against defendant to compel her to transfer to him certain stocks and bonds having a value of approximately $45,000.00 and a counterclaim by defendant to require plaintiff to return to her certain stocks of the value of about $40,000.00.

Plaintiff's action is based on the fact that defendant made a bill of sale to him of the stocks and bonds in question. Defendant as a defense asserts that her signature to the bill of sale and the prior transfer to him of the other stocks was obtained by undue influence, coercion and breach of the canons of legal ethics.

The record presents a tragic and distressing picture. Plaintiff is a lawyer and the son of defendant and her husband who died in 1938. Plaintiff and a sister, Mrs. Beswick, are the only children of their parents. Plaintiff graduated from Union College in 1921 and Albany Law School in 1924. He resides and practices his profession in Warrensburgh. Defendant and her husband, until the latter's death, resided in Warrensburgh. The husband was president and cashier of Emerson National Bank and president and treasurer of Schroon River Pulp & Paper Company. Defendant and her husband had substantial interest in the Paper Company and extensive real estate holdings. After the death of her husband defendant continued to make her home in Warrensburgh but spent about seven months of each year in Florida. Several years ago she disposed of her home in Warrensburgh and since then, when not in Florida, has lived with her daughter in Glens Falls.

It is plantiff's contention that in 1924 he had a conference with his father and mother in which they requested him to return to Warrensburgh after his graduation from law school and work under his father's direction in connection with the various enterprises in which they were interested and that if he did so they assured him that upon their deaths he would receive one-half of their estates. Plaintiff asserts that he assured his parents he would act in accordance with their request and that he did so not only during his father's lifetime but continued to act for his mother for many years thereafter. In his testimony

he states in great detail the services which he performed for both parents.

After the death of her husband defendant made from time to time distributions of her estate between plaintiff and her daughter and she continued to do so until 1952. Apparently both children were endeavoring to strip the mother of her property.

On many occasions plaintiff complained to his mother that the gifts to his sister and her children far exceeded those made to him. It would serve no useful purpose to discuss all these transactions.

I am convinced that the daughter has enriched herself out of her mother's property to the detriment of her brother. But for her acts, conduct and greed this lawsuit would never have arisen. The daughter imposed her will upon her mother. The latter when freed from the domination of the former made the gifts in question to her son in order to make an equitable distribution of her property. Undoubtedly she was motivated to do so out of natural love and affection and in order to appease her own conscience.

A reading of the record and the briefs of able counsel on both sides has confirmed the impression which I formed at the trial that the plaintiff is entitled to succeed. Because of the relationship of the partes I have felt it to be my duty to scrutinize their dealings with each other with extreme care.

If the parents of plaintiff made the agreement with him which he claims it is not an enforceable obligation—merely a moral one.

I cannot escape the conviction that the bill of sale which is the subject of this action was made and executed by defendant freely and without undue influence, coercion or duress on the part of plaintiff and that the securties which

are the subject of defendant's counterclaim were freely transferred by defendant to plaintiff without any taint of improper conduct on his part.

Plaintiff is therefore entitled to judgment for the relief demanded in the complaint and for a dismissal of the counterclaim, all without costs to either party.

Plaintff may submit findings of fact, conclusions of law and judgment in accordance with these views. All papers are herewith returned.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 10 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965.

No. 819.

HARRY A. REOUX,

Petitioner,

v.

THE FIRST NATIONAL BANK OF GLENS FALLS (as Executor of the Estate of ADELIA H. REOUX, deceased),

Respondent.

Brief in Opposition to the Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

CARL O. OLSON,
Attorney for Petitioner,
90 State Street,
Albany, N. Y. 12207

Of Counsel:

WOOD, MORRIS, SANFORD & HATT,
90 State Street,
Albany, N. Y. 12207

ERNEST B. MORRIS,
90 State Street,
Albany, N. Y. 12207

DAVID W. MORRIS,
90 State Street,
Albany, N. Y. 12207

KARL H. SCHRADE,
90 State Street,
Albany, N. Y. 12207

THE REPORTER COMPANY, INC., Walton, N. Y. 13856—865-4131—1966

Table of Contents.

	Page
Counter-question Presented	1
Counter-statement of the Case	1
First Appeal to the Appellate Division, Third Department	2
Re-argument of Counterclaims	2
Appeal to the Court of Appeals	3
Efforts to Collect the Judgment	3
Petitioner's Contempt Continued	4
The Motion for a New Trial	4
Appeal to the Appellate Division, Third Department	5
The New Trial	5
The Appellate Division's Affirmance	6
Appeal to the Court of Appeals	6
Renewed Efforts to Collect the 1957 Judgment	7
POINT I. Introduction into evidence of the November 9, 1953, will and the letter of even date upon the original trial would not have altered the ultimate result	7
A) The Will	8
B) The Letter	9

Page

POINT II. Whether or not fraud was practiced by defendant or her attorney, due process was not denied petitioner and no federal question is presented 10

CONCLUSION. Petition for a Writ of Certiorari to the Court of Appeals of the State of New York should be denied 12

CITATIONS.

Dohany v. Rogers, 281 U. S. 362 11

Helfrick v. Dahlstrom Metallic Door Co., 256 N. Y. 199, 176 N. E. 141, affd. 284 U. S. 594, 52 S. Ct. 202 11

Lyons v. Goldstein, 290 N. Y. 19, 47 N E 2d 425 11

Mooney v. Holohan, 294 U. S. 103 11

Moore v. Dempsey, 261 U. S. 86 11

Reoux v. Reoux (after August, 1958, Reoux v. First National Bank of Glens Falls), 3 A D 2d 560; 4 A D 2d 805; 4 A D 2d 840; 4 N Y 2d 1022; 4 A D 2d 1005; 11 A D 2d 876; 13 A D 2d 868; 14 A D 2d 648; 16 A D 2d 543; 21 A D 2d 940; 16 N Y 2d 685; 16 N Y 2d 835 2

Tumey v. Ohio, 273 U. S. 510 11

Weitzner v. Strickman, 271 A. D. 255, affd. 271 A. D. 255, affd. 296 N. Y. 907, 72 N E 2d 625 11

IN THE

Supreme Court of the United States

October Term, 1965.

No. 819.

HARRY A. REOUX,

Petitioner,

v.

THE FIRST NATIONAL BANK OF GLENS FALLS (as Executor of the Estate of Adelia H. Reoux, deceased),

Respondent.

Brief in Opposition to the Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

Counter-question Presented.

Was petitioner denied due process of law and a fair trial after eleven years of litigation in New York State courts culminating in a second review by the Court of Appeals?

On petition for re-argument the Court of Appeals considered that question and denied re-argument.

Counter-statement of the Case.

On August 11, 1954, petitioner sued his mother (Adelia H. Reoux) then 81 years of age, seeking to compel her to transfer to him certain securities. He based his complaint on a written instrument called a "Bill of Sale" which

petitioner had prepared for his mother's signature on April 11, 1954, when she was alone in the State of Florida.

The mother, in her answer (R. 10-15),* resisted petitioner's claim and counterclaimed for the return of other securities petitioner had taken from her in September, 1953.

After a trial in October, 1955, Official Referee Heffernan granted judgment in petitioner's favor on both the complaint and counterclaim.

First Appeal to the Appellate Division, Third Department.

On appeal, the Appellate Division of the Supreme Court, Third Department, on May 15, 1957, unanimously (Gibson, J., not sitting) reversed and found for the mother on both the complaint and counterclaim (*Reoux v. Reoux*, 3 A D 2d 560).

At page 562, the *per curiam* reads, in part:

> "* * * we think the plaintiff failed to sustain the burden which was cast upon him by the confidential relationship that existed between him and his mother, and *we reach this conclusion wholly from his own testimony* * * *." (Emphasis supplied.)

Re-argument of Counterclaim.

With new counsel, petitioner obtained re-argument of "so much of the appeal as concerned" the counterclaim.

At page 4 of his brief on that re-argument, petitioner quoted from his mother's August 2, 1954, letter to him, which she had offered in evidence on trial as her exhibit "E." This is the same letter petitioner quotes in full at

* Record citations are to the Record on Appeal filed in the Supreme Court of the United States by petitioner.

pages 8-9 of his petition herein. Petitioner based much of his re-argument on this letter, a letter strikingly similar to the "new evidence" letter produced later.

On June 24, 1957, the Appellate Division adhered to its original determination (4 A D 2d 805).

The mother then made application for a reference to take an accounting of the securities involved in the counterclaim. The Appellate Division appointed the late John J. Conway, Esq., as Referee (4 A D 2d 840).

Mr. Conway's report was confirmed (4 A D 2d 992) and judgment entered against petitioner for $99,306.54 December 3, 1957.

Appeal to the Court of Appeals.

Petitioner appealed to the Court of Appeals. In his brief to that court he again quoted his mother's August 2, 1954, letter and based much of the first point of his argument for reversal on the same letter.

The Court of Appeals unanimously affirmed June 25, 1958 (4 N Y 2d 1022).

Efforts to Collect the Judgment.

Adelia H. Reoux died on August 18, 1958.

Meanwhile, petitioner had refused to answer questions in supplementary proceedings and had unsuccessfully contested probate of his mother's last will and testament.

Mrs. Reoux's executor, as temporary administrator, pursued the supplementary proceedings and on December 31, 1959, the Supreme Court, Appellate Division, Third Department, found petitioner in contempt and fined him the amount of that court's former judgment, $99,306.54 (9 A D 2d 1005).

Petitioner's Contempt Continued.

On July 27, 1960, the Appellate Division denied the executor's motion for punishment of the contempt and directed the motion be renewed at Special Term (11 A D 2d 876).

The Motion for a New Trial.

During the pendency of that motion at Special Term (Aulisi, J.) petitioner in January, 1961, moved for a new trial on the ground of newly discovered evidence.

The Special Term (Best, J.) denied the motion on the merits, although petitioner had not made his mother's executor a party.

Petitioner appealed and the Appellate Division, after permitting the executor to intervene (13 A D 2d 868), dismissed the appeal without prejudice (14 A D 2d 648).

When petitioner renewed his motion at the October 31, 1961, Ballston Spa Special Term, Justice Best again denied it on the merits writing an opinion.

Justice Best wrote, in part:

> "As I read the findings made by the Appellate Division, Third Department and the opinion of such court, it appears to me their holding and determination was to the effect that Mrs. Reoux did not voluntarily part with the securities even though she did make a transfer of such property to her son. Reviewing and considering the alleged newly discovered evidence in this light, this Court is not convinced that a new trial would be likely to change the result as indicated by the new findings and the decision of the Third Department."

Appeal to the Appellate Division, Third Department.

On July 13, 1962, an appeal of the petitioner, the Appellate Division, Third Department, reversed and granted an order (16 A D 2d 543), later modified by an order of that court dated December 20, 1962, directing a new trial only of respondent's counterclaim.

The New Trial.

The new trial came on before Mr. Justice Michael E. Sweeney without a jury on January 2, 1963, and resulted in a dismissal on the merits of respondent's counterclaim and a vacating of respondent's judgment by a new judgment entered August 1, 1963.

The Trial Term's opinion (R. 170) correctly set forth the question presented (R. 171, 172).

> "Defendant contends that the proof produced on the retrial indicates that the transfer of the stocks in question did not constitute a gift freely and voluntarily made, but resulted from the influence and coercion exerted by the plaintiff upon his aged mother while he was acting in a son-mother, lawyer-client relation with her. Defendant further maintains that the letter of November 9, 1953, which accompanied the execution of the will of that date and which was the newly discovered evidence upon which the Appellate Division granted a new trial, does not debilitate its contention.
>
> "Plaintiff contends that the transfer of the securities in question was voluntarily and freely made. He further maintains that the letter of November 9, 1953, not only supports this contention, but also re-affirms the original gift.
>
> "The sole question to be determined is whether or not the proof offered on the retrial is sufficient to establish a free and voluntary gift of the securities in question."

Justice Sweeney then reviewed the "new" evidence and summarized it (R. 175):

> "* * * first, she engaged a disinterested lawyer and prepared a new will by which she left nothing to the plaintiff-son. Secondly, she carefully explained this act to the Executors, and finally, she wrote the letter of August 2, 1954, again referring to the securities, some of them by name, as gifts."

He then concluded (R. 175):

> "I conclude therefore, from all of the proof and particularly these last mentioned acts, two of which were done with the aid of counsel and all of which were done at a time when she was not under the control of the plaintiff, that the mother, in her own mind, had finally straightened out once and for all the disposition of her property and intended to let the matter end there.
>
> "In summary, I conclude on this record that the transfer of the securities to plaintiff in September of 1953 was intended to be a gift, and further that it was freely and voluntarily made."

The Appellate Division's Affirmance.

The Appellate Division, *per curiam,* after summarizing the same facts, held (R. 185) (21 A D 2d 940):

> "* * * We think that the trier of the fact could find that this additional proof was sufficient to tip the scale in plaintiff's favor and on the record as now constituted that he had sustained the burden of proof cast upon him by reason of the confidential relationship which existed between him and his mother."

Appeal to the Court of Appeals.

On appeal, by permission of the Court of Appeals, the order of the Appellate Division was unanimously reversed (16 N Y 2d 685).

In its *per curiam* decision the court stated at page 686:

> "* * * The law of the case is that plaintiff, Harry Reoux, acting as both an attorney and as a son, had the burden of establishing by 'clear and satisfactory' evidence that the transfer of the securities in question was a 'valid and voluntary gift' on the part of his mother, a burden which he failed to meet (*Reoux v. Reoux,* 3 A D 2d 560, affd. 4 N Y 2d 1022)."

Petitioner's motion for re-argument was denied July 9, 1965 (16 N Y 2d 834).

Renewed Efforts to Collect the 1957 Judgment.

The executor then proceeded to attempt to collect the 1957 judgment and discovered petitioner had moved from New York State and was residing in the State of Vermont.

Petitioner's application to stay the executor from proceeding with an execution sale was denied by the Court of Appeals (Fuld, J.) (16 N Y 2d 835) and by the United States Supreme Court (Harlan, J., November 16, 1965).

POINT I.

Introduction into evidence of the November 9, 1953, will and the letter of even date upon the original trial would not have altered the ultimate result.

It is petitioner's claim that he was denied a fair trial and due process of law by reason of respondent's attorney's "suppression" of a certain "November 9, 1953, will and letter" upon the original trial.

At the outset, it should be made clear that there is not one scintilla of evidence to show that respondent's at-

torney had any knowledge, whatsoever, upon the original trial, of the letter dated November 9, 1953.

This letter, which was the basis of the granting of a second trial to petitioner, was signed by the mother at the time she executed her new will on November 9, 1953. Both the letter and the will were prepared by Alfred D. Clark, attorney for The First National Bank of Glens Falls, the executor (R. 77).

A) The Will.

Petitioner had himself prepared the next preceding will dated July 21, 1953, and under that will received approximately one-half his mother's estate.

The petition (pp. 10-11) asserts first that the mother's counsel deceived the court by placing this "share—equally" will in evidence thereby inducing the "Appellate Court" to place "great stress" upon its existence and terms.

Nothing could be farther from the truth.

The mother's counsel's purpose in presenting the July will to the court was to destroy, by this document which petitioner drew, the very basis of his claim against his mother.

For while in 1954, when he was concocting this extraordinary lawsuit against his mother, he claimed to have spent "literally thousands of unrecompensed hours" in serving his parents (Petition, p. 4), in 1953 he drew a will and procured his mother's signature to it in which he caused her to forgive a $10,000 debt which he owed her in consideration of the *same* "thousands of unrecompensed hours."

Moreover, the "Appellate Court" did *not* place "great stress" on the July will.

The Appellate Division in their April, 1957, decision (Petition, p. 20-a), after reciting the sharp questions of fact and after mentioning the July, 1953, will in passing (Petition, p. 22-a), expressly stated (*id.* p. 23-a):

> "In the light of these simple principles we think the plaintiff failed to sustain the burden which was cast upon him by the confidential relationship that existed between him and his mother, *and we reach this conclusion wholly from his own testimony.*" (Emphasis supplied.)

Surely it must have occurred to petitioner or to his counsel that the mother, whose last years *their* lawsuit was making miserable, would hardly leave in effect a document voluntarily giving petitioner what she was seeking so desperately to keep from him!

His *claim* of surprise to learn of a new will after her death surely could not have been genuine.

B) The Letter.

When she executed her last will, the mother signed a letter in the handwriting of Alfred D. Clark, Esq., attorney for The First National Bank of Glens Falls, who prepared her will.

The letter reads:

> "November 9, 1953. The First National Bank of Glens Falls, New York. Gentlemen: By my will of this date, I have made no provision for my son, Harry Reoux. My reason for this action is that I have made transfers of securities to him in my lifetime, which with his other assets, should adequately provide for him and his family. I have reached this conclusion without suggestion from anyone, and as a result of considerable thought on my part. Very truly yours, Adelia H. Reoux. Witnesses: B. W. Francis, A. D. Clark."

In its latest opinion the Court of Appeals described these documents as follows:

> "The newly discovered evidence consisted only of the will dated November 9, 1953, disinheriting plaintiff and a letter of even date explaining the disinheritance. *These documents in no way refute plaintiff's own admissions of undue influence and overreaching, nor do they reveal any donative intent on the part of the mother as to the securities in question.*" (Emphasis supplied.)

The Court of Appeals thereby rejected the very argument petitioner urges upon this court when he states in his "question presented," at page 3 of his petition "was petitioner denied due process * * * by the suppression of evidence * * * where the effect of this suppression was to prevent evidence from coming before the court at the one point in time when it would have conclusively proved petitioner's case?"

POINT II.

Whether or not fraud was practiced by defendant or her attorney, due process was not denied petitioner and no federal question is presented.

It is interesting to note that the numerous allegations of fraud and deceit are made only in form of legal memoranda. There is not one shred of evidence to support these allegations and, in fact, the transcript of the second trial is entirely void of any such inference.

In any event, *whether or not fraud was practiced* by defendant or her attorney, *due process was not denied* petitioner.

The question of fraud was raised by petitioner in his application for re-argument and rejected (16 N Y 2d 834).

Petitioner's claim of denial of due process and a fair trial could not be further from the truth. Quite to the contrary, the petitioner received two trials, three full Appellate Division hearings, two reviews by the Court of Appeals and numerous Special Term arguments and petitions for re-arguments over more than eleven years and before (by petitioner's own count) thirty-six different jurists.

Now, while residing in the State of Vermont, to avoid the legal process necessary to enforce the judgment, the petitioner prays this court to hold he has been denied due process!

Due process requires that in order to affect the rights of a party, a competent court, duly constituted, and having proper jurisdiction must hear the matter at issue.

Dohany v. Rogers, 281 U. S. 362;
Lyons v. Goldstein, 290 N. Y. 19, 47 N E 2d 425;
Helfrick v. Dahlstrom Metallic Door Co., 256 N. Y. 199, 176 N E 141, affd. 284 U. S. 594, 52 S. Ct. 202;
Weitzner v. Stickman, 271 A. D. 255, affd. 271 A. D. 255, affd. 296 N. Y. 907, 72 N E 2d 625.

As pointed out above, the petitioner received this and much, much more.

In the cases cited by petitioner, i. e., *Tumey v. Ohio,* 273 U. S. 510; *Moore v. Dempsey,* 261 U. S. 86 and *Mooney v. Holohan,* 294 U. S. 103, the transcripts demonstrated conclusively that personal pecuniary interest of the judge, mob rule and overreaching by presentation of known perjured testimony were exercised to the prejudice of the petitioners. Such is not the case at bar. The record is void of any showing of improper conduct on the part of anyone but the petitioner himself.

It would be an unwarranted extension of present law to grant a writ of certiorari to petitioner on the basis of unsworn claims unsupported by any factual showing of suppression of evidence.

This is particularly true where petitioner has been granted a second trial on the basis of the very same evidence he claims was suppressed on the original trial.

CONCLUSION.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York should be denied.

Respectfully submitted,

CARL O. OLSON,
Attorney for Respondent,
Office and Post Office Address,
90 State Street,
Albany, New York, 12207.

Of Counsel:

WOOD, MORRIS, SANFORD & HATT,
90 State Street,
Albany, New York, 12207.

ERNEST B. MORRIS,
90 State Street,
Albany, New York, 12207.

DAVID W. MORRIS,
90 State Street,
Albany, New York, 12207.

Office-Supreme Court, U.S.
FILED
JAN 17 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 819

HARRY A. REOUX, *Petitioner*

v.

THE FIRST NATIONAL BANK OF GLENS FALLS, (as Executor of the Estate of Adelia H. Reoux, deceased), *Respondent*

On Writ of Certiorari to Court of Appeals of the State of New York

REPLY BRIEF FOR PETITIONER

PEYTON FORD
Attorney for Petitioner

Of Counsel:

FORD, AYER & HORAN
1000 Connecticut Avenue, N.W.
Washington, D. C.

JAMES C. STRANEY
3 Gaffers Court
Latham, New York

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 819

HARRY A. REOUX, *Petitioner*

v.

THE FIRST NATIONAL BANK OF GLENS FALLS, (as Executor of the Estate of Adelia H. Reoux, deceased), *Respondent*

On Writ of Certiorari to Court of Appeals of the State of New York

---

REPLY BRIEF FOR PETITIONER

Respondent, in its Brief in Opposition, states that "nothing could be further from the truth" than the Petitioner's assertion that Mrs. Reoux's counsel had induced the New York courts on appeal to place great stress on the existence and terms of the July 21, 1958 Will. (Brief in Opposition at 8). The truth of the

matter is that Mrs. Reoux's counsel emphasized before the courts that Mrs. Reoux had substantially complied with any alleged agreement respecting the division of her estate by the terms of the July 21, 1958 Will. A finding to that effect was requested by Mrs. Reoux's counsel at a time when he was fully aware that the July 21, 1958 Will was nugatory. (Appendix D of Petition, at 13a). The opinions of both the Appellate Division and the Court of Appeals bear evidence that these courts thought that Mrs. Reoux had continued her "share-equally" plan in her last will. (Appendix F, at 22a; E, at 19a). The decisions of both Special Term and the Appellate Division made after the new trial clearly reference the effect the suppression had on the previous proceedings. (Appendix B, at 4a; C, at 8-9a).

The November 9, 1958 Will was crucial because its appearance on probate forced to the surface other items of evidence probative of Mrs. Reoux's donative intentions. The November 9, 1958 letter which accompanied the Will and the testimony of the attorney who drew the Will and prepared the letter were basic to the Appellate Division's decision to grant a new trial. But the importance of these items derived from the fact that Mrs. Reoux had completely changed her Will. The testimony of Mrs. Reoux's counsel is clear on the facts that he was given a copy of the November 9, 1958 Will and that he had extended conversations with Mrs. Reoux about this Will prior to trial. (R. at 87, 89).

Respondent goes on in its Brief to remark that it surely must have occurred to the Petitioner that his mother had made another will. (Brief in Opposition, at 9). Yet this does not explain nor justify the deceit practiced by the Respondent and Respondent's counsel

upon the courts. The courts of New York could not take judicial notice of a will that Mrs. Reoux might have executed. At the time when these courts were concerned with the dispositions Mrs. Reoux had made of her property, her valid and subsisting Will was being suppressed by Respondent's counsel with the consequences set out in the Petition at 14-17.

WHEREFORE, the Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

PEYTON FORD
Attorney for Petitioner

Of Counsel:

FORD, AYER & HORAN
1000 Connecticut Avenue, N.W.
Washington, D. C.

JAMES C. STRANEY
3 Gaffers Court
Latham, New York